INDEX

	Page
Opinion below	2
Statement	2
Discussion	4
Appendix	11

CITATIONS

Cases:

Gault, In re, 387 U.S. 1	3
Greene v. *McElroy*, 360 U.S. 474	3
United States v. *Apex Distributing Co.*, 270 F. 2d 747	8, 10
United States v. *Blue*, 384 U.S. 251, 254	5
United States v. *Eisdorfer*, No. 330, this Term	8
United States v. *Halseth*, 342 U.S. 277	7
United States v. *Mersky*, 361 U.S. 431	5, 8, 9
United States v. *Sisson*, No. 305, this Term	6

Statutes:

18 U.S.C. 3731	2, 4, 7
50 U.S.C. App. 462(a)	2, 3, 7, 9, 10

Miscellaneous:

32 C.F.R. 1624.1(b)	3
41 Cong. Rec. 2755	7
Rule 12, F.R.Crim.P.	2, 10

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

THOMAS WILLIAM WELLER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO REMAND TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

On October 17, 1969, the United States filed in the District Court for the Northern District of California a notice of appeal to this Court from a judgment dismissing an indictment for failure to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462(a), on the ground that appellee had improperly been denied the right to be represented by counsel before his local Selective Service board. At the time the notice was filed we believed that the decision was appealable directly to this Court

under the "motion in bar" branch of the Criminal Appeals Act (18 U.S.C. 3731). On more extensive consideration, however, we have concluded that the appeal should have been taken to the court of appeals under that part of the Act allowing appeals from a "decision * * * dismissing any indictment" where the basis of the decision is not the "invalidity or construction" of the underlying statute. Accordingly, we move to have the case remanded to the Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States District Court for the Northern District of California (Appendix, *infra*, pp. 11-24) is not yet reported.

STATEMENT

Prior to trial, appellee moved under Rule 12, F.R. Crim.P., to dismiss the indictment on the dual grounds that the Selective Service regulation forbidding counsel to be present before the local board was unconstitutional, and that it was not authorized by the Military Selective Service Act of 1967. The following facts appear from the registrant's Selective Service file, which the district judge considered in connection with the motion to dismiss.

Appellee completed and submitted a form claiming conscientious objector status to his local Selective Service board. The board rejected the claim and classified him I-A. He requested a personal appearance, which was granted. Prior to the scheduled ap-

pearance, appellee wrote a letter to the board asking that his counsel be permitted to be present and advise him before the board. Relying on 32 C.F.R. 1624.1 (b), which provides that "no registrant may be represented before the local board by anyone acting as attorney or legal counsel," the board denied the request. Following the hearing, the local board declined to reopen appellee's classification. After unsuccessfully appealing this classification within the Selective Service System, appellee was ordered to report for and submit to induction. He failed to do so and was indicted under 50 U.S.C. App. 462(a).

On September 19, 1969, the district court granted the motion to dismiss on the ground that the regulation denying counsel in appearances before the local board was not authorized by statute. The court in its opinion did not hold that there was a constitutional right to counsel before the local board. Rather, notwithstanding that the regulation prohibiting representation by counsel has been a part of the Selective Service law since the parent statute was passed in 1940, and that it has been sustained by numerous courts of appeals (see App. 18), the court below held that Congress could not be deemed to have authorized the regulation. Relying upon asserted analogies to *Greene* v. *McElroy*, 360 U.S. 474, and *In re Gault*, 387 U.S. 1, the court found that "explicit action" (App. 14) by Congress, rather than a general delegation of power to prescribe local board procedures, was required to sustain the contention that Congress had empowered the Selective Service System to promulgate the regulation depriving registrants of

the privilege of representation by counsel, and that no such "explicit action" by Congress had been taken.

DISCUSSION

18 U.S.C. 3731 provides, in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> * * * * *
>
> If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court

> of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.
>
> * * * * *

Insofar as appeal to this Court is concerned, the Criminal Appeals Act affords two possibilities. The ruling below may be viewed as the granting of a "motion in bar" prior to the defendant's being put in jeopardy, or as a decision dismissing the indictment based upon the construction of the underlying statute. Although the questions are not free from doubt, it is our view, upon reflection and further consideration, that neither of these branches of the Criminal Appeals Act was intended to encompass this case.

1. This Court has never decided the scope of the statutory term "motion in bar." See *United States* v. *Blue*, 384 U.S. 251, 254. Two differing views have been expressed. Mr. Justice Brennan, concurring in *United States* v. *Mersky*, 361 U.S. 431, 441, adopted the broad position that a decision sustaining a motion in bar is any judgment "which will end the cause and exculpate the defendant." Under this view, any ruling—including any decision with respect to regulations under a criminal statute—the effect of which is to preclude future prosecution of the defendant on the same charge would be appealable (if rendered prior to the attachment of jeopardy) *only* to this Court.

Mersky involved a prosecution for violating regulations promulgated in relation to an import statute. Prior to trial the district court dismissed the infor-

mation on the ground that the regulations were not sufficiently clear to justify a criminal prosecution. The United States appealed to the court of appeals, which certified the case to this Court, deeming the appeal to lie here both under the "decision * * * dismissing" and "motion in bar" branches of the Criminal Appeals Act. The majority held that direct appeal was proper under the former branch and did not reach the motion in bar issue. Three Justices (Frankfurter, Harlan, and Stewart, JJ.) dissented, disagreeing with this conclusion and also disagreeing with Mr. Justice Brennan's interpretation of the "motion in bar" provision. Noting that the term had been altered in 1948, without intended change in substance, from its form in the original 1907 statute—*i.e.*, "special plea in bar"—the dissenters argued that the scope of appeals granted under this branch was limited solely to the category of motions included within the common law concept of a special plea in bar. This also was the view of the United States.

As discussed in our brief in *United States* v. *Sisson*, No. 305, this Term, the provisions of the original 1907 Act and its legislative history are the crucial focus for any inquiry as to the scope of the right of appeal to this Court. That legislative history indicates that Congress was using the term "plea in bar" in its common law meaning, or as something different from a demurrer. A sponsor of the 1907 legislation explained that a "special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with

which he is charged" (41 Cong. Rec. 2753). Or, as the dissenting opinion in *Mersky* phrased it (361 U.S. at 457):

> The plea in confession and avoidance did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect. * * * It set up affirmative defenses which would bar the prosecution.

Examples of motions in bar under this definition include claims of res judicata, statute of limitations, immunity and denial of speedy trial.

This case does have some elements of confession and avoidance, since the defendant by his motion does not deny that he failed to report for induction as ordered, but argues that he cannot be prosecuted therefor because the procedure underlying the order was invalid. Nevertheless, we do not believe that his motion can properly be treated as raising a plea in bar. It is a foundation of any prosecution under Section 462(a) that the order disobeyed must be a valid order. Thus, what defendant raised by his motion was a claim that the indictment did not charge an offense; he was not claiming that although an offense had been committed, he could not for some extraneous reason be prosecuted therefor.

2. The decision of the district court seems to us to be the sustaining of a demurrer based on the indictment as amplified by agreed facts. See *United States* v. *Halseth*, 342 U.S. 277. As such it is clearly appealable under 18 U.S.C. 3731, but the question remains where the appeal lies. The statute provides

for a direct appeal to this Court from a decision dismissing an indictment when the decision is "based upon the invalidity or construction of the statute upon which the indictment * * * is founded." All other decisions sustaining a demurrer to an indictment are appealable to the court of appeals. The specific issue in this case is thus whether the district court's holding—that the indictment must be dismissed because the regulations forbidding counsel to be present on behalf of a registrant before the local board are unauthorized—is "based upon the * * * construction of the statute upon which the indictment * * * is founded." [1]

Again the critical case is *United States* v. *Mersky*, 361 U.S. 431, where the defendant was charged with violating regulations promulgated pursuant to an import statute. There the Court held that the regulations directly amplified the statute in terms of defining the conduct prohibited and that, in these circumstances, a decision construing the regulations was a decision construing the underlying statute. In *United States* v. *Eisdorfer*, No. 330, this Term, arising under the "motion in arrest" branch of the Criminal Appeals Act, we have taken the position that a direct appeal lies to this Court from the district

[1] While the statute, literally read, allows appeals to the court of appeals from any dismissal of an indictment not appealable to this Court, it has been interpreted as not reaching orders based on motions which are not in the nature of a demurrer or plea in abatement. See *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9) (*en banc*)). That issue is not involved here.

court's ruling granting appellee's motion in arrest on the ground that the delinquency regulations promulgated under the Selective Service laws are invalid for failure to set forth a sufficient standard governing their use. In our view, an indictment charging failure to obey the order to report under 50 U.S.C. App. 462(a) contains an implicit allegation that the order was valid. Construction of the regulations invalidated in *Eisdorfer*, which go directly to the legality of the registrant's classification, thus amounts to a construction of the underlying statute under *Mersky*.

This case is one step removed from the situation in *Eisdorfer*. The regulations here invalidated do not go to a registrant's classification as such, but rather to the process by which the local board determines the classification. Thus, to apply the *Eisdorfer* rationale here it is necessary to argue that the issue of appellee's classification, which goes to the validity of the order to report, is encompassed in the charge of disobedience to the order and that the regulations bearing upon the process by which the local board determined the classification in turn condition the validity of the classification. While the district court was doubtless justified in concluding that the invalidity (in its view) of the process is sufficiently connected with the charge of wilful disobedience to justify dismissal of an indictment under Section 462(a), it is more doubtful that the court's decision can properly be deemed to construe the statute on which the indictment is founded.

In sum, we have come to the conclusion that it would extend the *Mersky* rationale too far to read

the decision below as a construction of 50 U.S.C. App. 462(a), the statute on which the indictment was founded. It follows that the instant case should be remanded to the court of appeals under the explicit procedure set forth in the Criminal Appeals Act governing such situations. Since appellee's motion below clearly constitued an attack upon the sufficiency of the indictment under Rule 12, F.R.Crim.P., the decision below granting the motion and dismissing the indictment is appealable to the court of appeals, provided this Court accepts our submission that it does not come within either of the two branches of the Criminal Appeals Act (discussed *supra*, pp. 5-7), which allow appeal solely to this Court.[2] See *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9) (*en banc*)).

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1969.

---

[2] If the Court is of opinion that this case is, or may be, appealable to this Court, we request that it treat the present Motion to Remand as a Jurisdictional Statement.

APPENDIX

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

No. 42614

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS WILLIAM WELLER, DEFENDANT

ORDER GRANTING MOTION TO DISMISS INDICTMENT

The Defendant has made a motion to dismiss the indictment against him pursuant to Fed. R. Crim. P. 12. Defendant contends that his constitutional rights were violated because his request to have his attorney present during the personal appearance on his conscientious objector claim was denied pursuant to 32 C.F.R. § 1624.1(b) which provides:

> . . . no registrant may be represented before the Local Board by anyone acting as attorney or legal counsel.

Alternatively, the defendant contends that the section of 1624.1(b) quoted above is not authorized by the Selective Service Act of 1967, 50 U.S.C.A. App. § 451, et seq.

The pertinent facts, which are apparent from the Defendant's Selective Service file, are as follows: The Defendant requested, received and filed with his local board a Form 150 (Special Form for Conscientious Objector). The board classified the Defendant I-A and the Defendant requested a personal appearance. The Board scheduled the appearance for

November 8, 1967. The Board received a letter from the Defendant's attorney on November 6, 1967 which requested that the board grant Defendant's attorney permission to be present at the personal appearance to advise him with respect to his rights. Relying on 32 C.F.R. § 1624.1(b), the board denied the requested permission. Following the hearing, the Defendant's board declined to reopen his case and retained him in class I-A. The Defendant then unsuccessfully appealed this classification.

There is no question that the hearing before the local board on a registrant's claim for conscientious objector status is a critical stage of an administrative process at which substantial rights are adjudicated. The failure to sustain one's claim can result in requiring a registrant to serve his country in a manner different both in type (a I-A-O serves in the armed services in a non-combatant capacity) and in hazard (a I-O performs non-military alternative service in the national interest).

In *Greene* v. *McElroy*, 360 U.S. 474, (1959), the Supreme Court held that the administrative denial of traditional forms of fair procedure, particularly where substantial constitutional doubts are raised, are not to be presumed to be authorized "by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." The *Greene* case dealt with the administrative withdrawal of security clearance causing the plaintiff's loss of a job in private industry, and the procedural safeguards which were missing were the right to confrontation and cross-examination of those who gave information adverse to Mr. Greene. Certainly, failing to establish a conscientious objector claim is as serious as the impact of loss of the right to have

access to classified information (hardly what most people would consider to be a "right"). The right to counsel is also a traditional safeguard, and the only apparent reason it was not dealt with in *Greene* is because Mr. Greene was represented by counsel in all of his proceedings. Indeed, of what value would be the right to confrontation and cross-examination without the right to counsel skilled in those arts? It seems clear that the affirmative denial of the right to be represented by retained counsel, even in a "civil" proceeding, where substantial loss of liberty may be at stake, is subject to grave constitutional doubts. *In re Gault*, 387 U.S. 1 (1967).

In spite of the fact that the *Greene* court did not decide that the plaintiff had a *constitutional* right to confrontation and cross-examination, the court held that plaintiff had such rights because the "Nation's lawmakers" did not *explicitly* authorize their withdrawal by the Defense Department. Accordingly, in the case at bar, the only "lawmakers" who could explicitly authorize the denial of counsel in hearings before the local draft boards are Congress, not the President, since the President could not raise an army, through induction, without the authority of Congressional legislation.[1] However, nowhere in the

---

[1] While under Article 2 § 2 of the Constitution the President is Commander in Chief of the Armed Forces (See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886), under Article 1 § 8, Congress, not the President, (See *Swaim* v. *United States*, 28 Ct. Cl. 173, *Aff.* 165 U.S. 553 (1893); 6 Op. Atty. Gen. 10 (1853)), is given the power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy and to make all laws necessary and proper for the execution of those powers. It is pursuant to these Congressional powers that the Selective Service Act of 1967 was passed, and it was obviously upon the premise that only Congress could raise an army that Congress found it

Act has Congress expressly denied the right to counsel or expressly delegated the power to do so to the President. The only possible sources of such a delegation are Section 1(c) which states that service should be "in accordance with a system of selection which is fair and just. . . .," and section 19(b)(3) which provides "such local boards. . . shall, under rules and regulations prescribed by the President, have the power. . . to hear and determine. . . all questions and claims with respect to. . . exemption . . . ." These sections clearly are not "explicit action by the Nation's lawmakers" (in this case Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel.

In *Greene* the argument was made that delegation of the power pruning the traditional procedural rights should be found because of Congressional and Presidential acquiesence in the program. The court dismissed the contention as follows:*

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. . . . . We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we are asked to judge whether, in the context of

---

necessary to authorize the President "to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title. . . such number of persons as may be required to provide and maintain the strength of the Armed Forces." 50 U.S.C.A. App. § 454(a).

* 360 U.S. at 506, 507.

> security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, *within their respective constitutional powers*, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action . . . . They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized. . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them. [Emphasis added.]

Greene, therefore, is persuasive authority for the proposition that 32 C.F.R. § 1624.1(b) is not authorized by the statute.

Six years prior to *Greene* the Supreme Court decided *United States* v. *Nugent*, 346 U.S. 1 (1953) (5-to-3 decision). The defendant contended that the requirement of a "hearing" under the then-existing section 6(j) of the Selective Service Act meant that he should be entitled to cross-examine those who gave statements to the F.B.I. deleterious to his claim. The Court denied this claim, feeling that the "6(j) hearing" was not a "determinative" one and that there was "no time" for "litigious interruption." The first

reason is not applicable to our situation because now the hearing before the board is determinative. Reason two is not persuasive and was not followed in *Greene*. If litigious delays of potential members of the armed forces are of concern, *a fortiori* such delays regarding those already in the service are of equal if not greater concern. Yet, counsel participate in hearing with respect to members of the army who claim conscientious objector status. Army Regs. 635-20, para. 4(d) (Jan. 22, 1969). Finally, *Nugent* was not a "right to counsel" case, and the governmental interest in protecting sources of confidential information is more compelling than preventing a possible slight delay caused by the presence of retained counsel at a registrant's personal appearance. Indeed, counsel was permitted to participate in the "6(j) hearings". *Storey* v. *United States*, 370 F.2d 255 (9th Cir. 1966).[2] As Mr. Justice Frankfurter so eloquently stated in his dissent:

---

[2] It is interesting to note that following the *Greene* case President Eisenhower, in Executive Order 10,865, set up a security clearance procedure which included the opportunity to be represented by counsel. Exec. Order No. 10,865, 25 Fed. Reg. 1583 (1960), as amended in 3 C.F.R. § 512 (1968). The *Nugent* case was subsequently followed in *Gonzales* v. *U.S.*, 364 U.S. 59 (1960). Petitioner claimed denial of due process because he was denied, at trial, the right to have the Justice Department hearing officer's report, as well as the original report of the F.B.I. The Court rejected this claim, holding that neither was relevant at trial as the case "centered entirely on the Department's recommendation, which petitioner repudiated, but which both the appeal board and the court below found supported by the record." 364 U.S. at 64. Although "following" *Nugent*, the Court concluded that: "This is not to say that there might not be circumstances in a particular case where fairness in the proceeding would require production. *No such circumstances, as foundation for a claim of*

> Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice, in cases where the sincerity of another's religious conviction is at stake, and where prison may be the alternative to an abandonment of conscience. *The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies.*

346 U.S. at 12, 13. [Emphasis added.]

The right to counsel has been considered increasingly important in recent years. Indeed, the Supreme Court has held it to be such a fundamental right that even in juvenile proceedings, supposedly non-adversary, the youth has a constitutional right to counsel of his own:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The

---

actual unfairness, are before us." 364 U.S. at 65. [Emphasis added.] Therefore, the holding in *Gonzales* is not persuasive in deciding the case at bar, because it was based wholly on the Court's conclusion that the facts demonstrated that Gonzales suffered no unfairness due to the denial of production of the documents. The reasoning of the *Greene* court, to the contrary is much like the present case, because the possibility of unfairness to petitioner Greene—certainly no greater than to defendant Weller—led the Court to hold that the denial of traditional safeguards was not to be inferred, but rather required explicit authorization.

> child 'requires the guiding hand of counsel at every step in the proceedings against him.'
>
> *In re Gault, supra.*, at 36. [Citations omitted.]

Even though the right to counsel has been so considered, lower federal courts have consistently taken the position that there is no right to be represented by retained counsel at Selective Service hearings. *Nickerson* v. *United States*, 391 F.2d 760 (10th Cir.), *cert. denied* 392 U.S. 970 (1968); *United States* v. *Dicks*, 392 F.2d 524 (4th Cir. 1968); *United States* v. *Capson*, 347 F.2d 959 (10th Cir. (1965)); *Tantash* v. *United States*, 409 Fed. 2d 227 (9th Cir. 1969); *Haven* v. *United States*, 403 Fed. 2d 384 (9th Cir. 1968). In most of the cases in which the matter has been raised, the courts have either dismissed it with no discussion, placed their reliance on the fact that the personal appearance of the registrant before the board is not at a criminal proceeding within the ambit of the 6th Amendment, or held that failure to request counsel deprived the registrant of standing to raise the issue. (E.g., *Haven*, *supra.*) In still other cases the Court's language has merely been dictum. See *Tantash*, *supra; Haven*, *supra.* No case cited to the Court by the government or found by this Court has addressed itself to the apparent lack of specific authorization in the Selective Service Act for the denial of counsel before the local boards.

The often-abbreviated and sometimes-cryptic treatment of this traditional procedural safeguard has persisted in spite of the many significant procedural developments in other areas of the law. While conscientious objector status may be a "privilege" and not a "right" (See *Uffelman* v. *United States*, 230 F.2d 297 (9th Cir. 1956)), it is now established that

the government may not distribute its largesse in a manner which ignores traditional procedural safeguards. Although the issuance of a liquor license would hardly be considered by most a "right", nevertheless an applicant for a liquor license has far more procedural rights than a Selective Service registrant whose life may ultimately be placed in jeopardy. See *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964). Likewise a welfare recipient has more procedural rights than a Selective Service registrant, see *Kelly* v. *Wyman*, 294 F.Supp. 893 (S.D. N.Y. 1968) (three judge court), as does an applicant for admission to the bar. See *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963). In the area of juvenile proceedings the arguments that a juvenile has a right "not to liberty but to custody," that proceedings are "civil" rather than "criminal", and that the proceedings are non-adversary were advanced in order to justify elimination of the right to counsel. Although the constitutionality of the juvenile court laws had been upheld in over 40 jurisdictions, nevertheless the Supreme Court rejected these justifications. *In re Gault, supra.* When the reasoning of the Gault case was advanced in the selective service context, one court of appeals cited two pre-*Gault* court of appeals cases and one 1911 Supreme Court case dealing with abridgment of freedom to contract to hold "it is well settled that there is no Constitutional right to counsel in administrative proceedings under the Selective Service Act." *United States* v. *Dicks, supra.* The court so decided despite the fact that the vague standards, burdensome volume, and restricted review in the Selective Service System cases lend themselves to precisely the same kind of abuse which Dean Pound in 1937 found should be surrounded by more formal procedural safeguards

and the Supreme Court in 1967 held required the right to counsel. *Gault, supra* at 18-19. See also Report of the National Advisory Commission on Selective Service.[4] It has even been held that in small claims proceedings which are clearly "civil" and may even be classified as "de minimus", the right to have counsel make a meaningful appearance somewhere in the proceedings cannot be withdrawn. *Mendoza* v. *Small Claims Court*, 49 C.2d 668, 321 P.2d 9 (1958); *Prudential Ins. Co.* v. *Small Claims Court*, 76 C.A. 2d 379, 173 P.2d 38 (1946).

Cases such as *In re Groban*, 352 U.S. 330 (1957) (5-to-4 decision) and *Madera* v. *Board of Educ.*, 386 F.2d 778 (2nd Cir. 1967); *cert. denied*, 390 U.S. 1028 (1968), do not compel a different result. In the *Groban* case it was held that a witness was not entitled to be assisted by retained counsel when giving testimony before a Fire Marshal. In *Madera* a parent and child were denied permission to be represented by counsel at a guidance conference involving their child pursuant to a Board of Education Regulation. If a person is not entitled to be represented by counsel before a Fire Marshal, before a Grand Jury or before guidance counselors, it is because these proceedings are preliminary in nature and in no way result in a final adjudication. *Madera, supra* at 788; *In re Groban, supra* at 334. If a charge imperiling an individual's liberty were to arise from one of these hearings, a trial would ensue at which the government would have the burden of proof, and the defendant, with the aid of counsel, could attack the substance of any conclusions tentatively reached at the preliminary hearing which resulted in the

---

[4] Government Printing Office (1967).

charge. The *Madera* court's reliance on the failure of the court in *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) to add right to counsel to its outline of a fair proceeding prior to suspension of a student is misplaced, since the plaintiffs in their pleadings did not request the right to counsel. *Dixon, supra* at 151, n.1. Furthermore, to the extent that the *Madera* case relies on Selective Service cases for authority it is for present purposes circular.

In contrast to the preliminary nature of the above proceedings, a registrant's personal appearance before his local board is in every sense an adjudication at which the registrant should be awarded traditional judicial safeguards. See *Hannah* v. *Larche*, 363 U.S. 420 (1960). In 50 U.S.C.A. App. § 460(b)(3) Congress has substantially insulated the factual determinations of local and appeal boards. Review of such determinations in a hearing at which counsel is present is restricted to habeas corpus after, or criminal prosecution for refusal of, induction. The scope of review is limited to the question whether there was any "basis in fact" for the classification assigned. While judicial review is thus substantially restricted, the decision of the local board obviously has a dramatic impact on the registrant's life and liberty.

It is contended that since a conscientious objector hearing is an inquiry into the registrant's state of mind, the presence of counsel would not only be of no assistance but, because of the probability that he would make vexatious objections to questions and testimony, counsel's presence would be to the registrant's disadvantage. It is unrealistic to assume that an attorney who is familiar with the very limited scope of judicial review available would do anything which would antagonize a local board or leave it with an impression other than one of complete candor.

Also, the registrant will be more able to present his case if he is articulately represented by counsel.

Counsel will also act as a deterrent to possible abrupt or summary treatment of the registrant's claim (*Cf.*, *United States* v. *Wade*, 388 U.S. 218 (1967)). He may also bridge potential hostilities which result from the difference in ages between the board members (who are between 30 and 75 years old, 32 C.F.R. § 1604.52(c), (d)) and the registrant. Through questioning or argument, counsel can clear up any inconsistencies or vagaries in the registrant's testimony before the board which, if uncorrected, might lead the board to decide against an otherwise qualified registrant. Counsel would be very familiar with the requisite statutes, regulations, and interpretative cases. The registrant may never have previously been required to articulate his beliefs and he may omit or confuse critical aspects of his beliefs. The presence of counsel would be crucial to leaving the board with a complete portrayal of the registrant's relevant beliefs. Finally, a brief summary by counsel may focus the board's attention on the elements of a conscientious objector claim and relate them to what the registrant has said, pointing out why the registrant should be believed. For a review of some of the difficulties encountered in passing on conscientious objector claims, see *United States* v. *Houghten*, 9th Cir. No. 23,556, June 19, 1969. All of the above roles are ones in which attorneys commonly operate, but with which a registrant is likely to have little familiarity. Of course, a registrant is always free to appear without counsel if he concludes that this would be to his advantage. Finally, a local board is not without power to terminate a hearing which is being unduly extended by counsel.

It could be argued that 32 C.F.R. § 1604.41, providing that "Advisors to registrants may be appointed . . . to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law" supplies such procedural safeguards as to remove from 32 C.F.R. § 1624.1(b) the taint of doubtful constitutionality.[4] This does not follow. Even assuming that the appeal agent would be legally qualified, 32 C.F.R. § 1604.71(c), there is no provision for his appearance before the board except when the board so requests. 32 C.F.R. § 1604.71(d)(2).

---

[4] 32 C.F.R. § 1604.71 provides as follows regarding these advisors (appeal agents):

> (c) Each government appeal agent and associate government appeal agent shall be, whenever possible, a person with legal training and experience.
>
> (d) It shall be the duty of the government appeal agent. . .
>
> (1) to appeal. . . from any classification of a registrant by the local board which is brought to his attention and, in his opinion, should be reviewed by the appeal board.
>
> (2) To attend such local board meetings as the local board may request him to attend.
>
> (3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered. . . . .
>
> (5) *To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.* [Emphasis added.]

Furthermore subsection (d)(5) injects such a conflict of interest [5] into any representation the appeal agent may provide that it is doubtful that he could act for the registrant in the role of an attorney.[6] He certainly cannot claim to represent the best interests of the registrant and still be in compliance with subsection (d)(5).

Accordingly, this Court is loathe to hold that the administrative denial of such a right is either authorized by Congress or is constitutional.

The motion to dismiss is granted.

Dated:

/s/ ROBERT F. PECKHAM
United States District Judge

---

[5] In an August 20, 1968 letter, written at the direction of the Board of Governors of the State Bar of California by Staff Attorney Mary G. Wailes, to all members of the Bar serving as Government Appeal Agents, it was stated: "The Board wishes you to be advised, however, that in its opinion in acting as an appeal agent you may be exercising dual responsibilities that could put you in a position of representing conflicting interests."

[6] "To permit the inroad of a class of legal advisers being used as undisclosed informants for the Federal Government will confirm the suspicion and distrust with which some laymen approach full disclosure of their vital interests to their lawyers . . . . The ill-considered directive of General Hershey, already disavowed by government legal specialists, is clearly improper." *Lawyers Cannot be Informants*, 54 A.B.A.J. 153, 154 (1968).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 371526 384